A

Quaik Yong Lai & Ors v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS P-05(SH)-547–11 OF 2022 AND P-05(SH)-548–11 OF 2022
AHMAD ZAIDI IBRAHIM, AZMAN ABDULLAH AND AZMI ARIFFIN JJCA
5 DECEMBER 2024

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Kidnapping — Appellants were convicted under s 3 of Kidnapping Act 1961 read with s 34 of Penal Code — Appellants sentenced to life imprisonment and ten strokes of whipping — Whether prima facie case proven — Whether D *identification parade flawed and not properly done — Whether charge against appellants defective and bad in law — Whether there was a demand of ransom — Whether appellants' evidence leading to discovery was admissible under s 27 of Evidence Act 1950 — Whether all appellants acted together in furtherance of their common intention under s 34 of Penal Code — Whether case proven beyond* E *reasonable doubt — Evidence Act 1950 s 27 — Kidnapping Act 1961 s 3 — Penal Code s 34*

The victim ('SP5') in the present case was a ten-year-old child. Based on the evidence of the SP5's aunty ('SP4'), the one who brought SP5 to his tuition F centre, as well as the evidence of SP5, his mother ('SP20') and his father ('SP13'), when SP5 arrived at the tuition centre, SP5 was forced into another car by the appellants and he was then confined in a premise until nightfall and subsequently released around midnight at a bus stop. SP13 found SP5 at the bus stop and brought him home. Between SP5's confinement and his release, G SP20 was contacted for ransom money which she managed to collect a sum of RM1.75m. This money was brought to be delivered by SP20 after she had photographed the stacks of money to be delivered, to a place as directed by way of phone call. The police managed to arrest the three appellants and during the arrest, the appellants had given information leading to discovery of large sums H of money. The appellants were charged under s 3 of the Kidnapping Act 1961 ('Act 365') read together with s 34 of the Penal Code ('the PC'). In defence, the appellants denied their involvement in the offence and contended that the money was discovered not on the information given by them but instead the money was recovered during the investigation. All the three appellants denied I knowledge of the money recovered. On top of that, the third appellant testified that at the time of the abduction he was getting himself tattooed by a person named Peter Wong at a tattoo parlour. At the end of the trial, the trial judge convicted the appellants of the offence and sentenced each of them to life imprisonment with effect from the date of arrest and ten strokes of whipping,

hence, the present appeals. The grounds of appeal relied upon by the appellants were: (a) whether a prima facie case had been proven against the appellants; (b) whether the identification parade held were flawed and not properly done; (c) whether the charge against the appellants was defective and bad in law — with regard to this issue, the appellants argued that the charge was bad for duplicity because two different acts of kidnappings (ie, wrongful abduction and wrongful confinement) had been rolled into a single charge; (d) whether there was a demand of ransom; (e) whether the appellants' evidence leading to discovery was admissible under s 27 of the Evidence Act 1950 ('Act 56') — in relation to this issue, the appellants contended that the trial judge was said to have based solely on the testimony SP18 that the first accused had led to the discovery of the alleged partial ransom money found inside the speaker placed at the living room within the premises; (f) whether all the three appellants had acted together in furtherance of their common intention under s 34 of the PC; and (g) whether a case had been proven against the appellants beyond reasonable doubt.

Held, dismissing the appeals and affirming the conviction:

(1) There was overwhelming evidence that the ingredients of the offence of kidnapping had been proven by the respondent. The court found no defects in the identification evidence neither there was any doubt in the identification of the three accused by SP5. The identification parade was conducted regularly, transparent and fair to the accused persons. The court was mindful that when the identity of an accused was raised, the court ought to have in mind the guidelines set out in *R v Turnbull and others* [1976] 3 All ER 549 when assessing the quality of the identification evidence. Based on the facts and evidence, the court was satisfied that the trial judge had considered the evidence on this critical issue at the end of the prosecution's case and upon giving them the maximum evaluation. Under intensive cross-examination, SP5 and SP4 remained steadfast in their answers on their identification of the appellants. Hence, the court found no justification to interfere with the trial judge's assessment of SP5 and SP4. There was ample corroboration of SP5's testimony in court by SP4 and identification parade conducted by the police (SP2) which had obviously enhanced SP5 credibility. Accordingly, the court was satisfied that the defence was rightly called by the trial judge at the end of the prosecution's case (see paras 14, 18–19 & 22).

(2) It was clear from the wording of the charge that the act charged off was 'abduction and wrongful confinement' as expressly stated in the charge. The prosecution had described specifically the act that the appellants had committed. Thus, the appellants knew well what the case were against them when the prosecution closed its case and they had been afforded all the opportunity to present their defence. For that reason, it was open to

the prosecution to choose and prove the relevant act in the course of the trial. Hence, the court found no prejudice suffered by the appellants in preparing their defences. The charge was therefore not defective or a nullity. In fact, the learned trial judge in his judgement had rightly found that the prosecution had proven all the three elements of abduction, wrongful confinement and wrongful restraint. Thus, the court found that the point taken by the appellants' counsel was obviously unsustainable (see paras 24–26).

(3) The court found that the testimony of SP20 that there was a demand of ransom was indeed credible. SP20 had no purpose or reason to fabricate her evidence against them. Support for this could be found in her evidence as per encl 8 of record of appeal Vol 2(2) pp 306–313 (see para 27).

(4) Even though SP18 did not record the details in any contemporaneous note, nor produce any arresting report to corroborate and verify the information given by the first accused, the fact that the first accused pointed out to the speaker which led to the discovery of the ransom money fell within the scope of s 27 of Act 56. As for the third accused, it was apparent from the evidence of DSP Mohamad Shajidan bin Abdul Shukor ('SP19') that when the third accused was arrested, the accused gave information to him leading to the discovery of the ransom money. Subsequently, SP19 made a police report on the information given. Hence, s 27 of Act 56 did apply here. In short, the court agreed with the trial judge's finding on the issue of s 27 of Act 56. Such findings of facts must certainly be remained undisturbed (see paras 33 & 35–36).

(5) Section 34 of the PC was a rule of evidence and did not create a substantive offence. Common intention was a question of fact. The proof of common intention was the matter of inference from the circumstances. Mens rea being a mental element or state of mind was not usually capable of being established by way of direct evidence. It could be gathered from indirect evidence in each particular case. The best evidence to establish common intention was to look at the appellants' conduct prior to, at the time of and after the offence. All these acts when combined together proved their nexus to the offence, stands. The appellants' involvement could be gathered inter alia from the following evidence: (a) SP5 could identify all the three accused and confirmed the role played by each of them during abduction and confinement; (b) the chronology of the events and the manner in which the whole incident was executed also showed that it was well planned; (c) all these acts when combined together proved their common intention; and (d) some of the notes discovered by the police from the information given by the appellants matched the serial numbers of the stack of money given as ransom (see paras 38 & 42).

(6) A close scrutiny of the learned trial judge judgment revealed that he had judicially considered the defence advanced by the appellants and weighed all their evidence before coming to a definite finding of fact. The learned trial judge had not fallen into error in his findings when he relied heavily on the evidence given by SP5 and after giving sufficient appreciation to the other overwhelming oral and documentary evidences in its entirety. The court did not find any infirmities in the decision of the learned trial judge. In addition, it was crystal clear from the judgment that the learned trial judge had rightfully, appropriately and inclusively addressed his judicial mind to the defence, considered their versions and adequately explained why he chose to disbelieve the evidence of the defence. The court did not see how the trial judge could be said to be wrong with his finding of facts. He had the advantage of seeing and hearing the witnesses. In the premises, the court found no misdirection on the part of the learned trial judge that warranted appellate intervention (see paras 46–47).

[Bahasa Malaysia summary

Mangsa ('SP5') dalam kes ini ialah seorang kanak-kanak berumur sepuluh tahun. Berdasarkan keterangan makcik kepada SP5 ('SP4'), yang membawa SP5 ke pusat tuisyennya, serta keterangan SP5, ibunya ('SP20') dan bapanya ('SP13'), apabila SP5 tiba di pusat tuisyen tersebut, SP5 telah dipaksa masuk ke dalam sebuah kereta lain oleh perayu-perayu dan dia kemudiannya dikurung di sebuah premis sehingga malam dan seterusnya dibebaskan sekitar tengah malam di sebuah perhentian bas. SP13 menemui SP5 di perhentian bas tersebut dan membawanya pulang. Di antara masa SP5 dikurung dan dibebaskan, SP20 telah dihubungi bagi mendapatkan wang tebusan yang mana jumlah sebanyak RM1.75 juta berjaya dikumpulkan. Selepas SP20 mengambil gambar timbunan wang yang akan dihantar tersebut, wang ini dibawa ke tempat seperti yang diarahkan melalui panggilan telefon. Polis berjaya menahan ketiga-tiga perayu dan semasa penahanan tersebut, perayu-perayu telah memberi maklumat yang membawa kepada penemuan sejumlah besar wang. Perayu-perayu dipertuduh di bawah s 3 Akta Penculikan 1961 ('Akta 365') dibaca bersama s 34 Kanun Keseksaan ('KK'). Dalam pembelaan, perayu-perayu menafikan penglibatan mereka dalam kesalahan tersebut dan berhujah bahawa wang tersebut ditemui bukan berdasarkan maklumat yang diberikan oleh mereka sebaliknya wang tersebut ditemui semasa siasatan. Ketiga-tiga perayu menafikan pengetahuan mengenai wang yang diperolehi. Selain itu, perayu ketiga memberi keterangan bahawa pada masa penculikan tersebut dia sedang dicacah tatu oleh seorang yang bernama Peter Wong di sebuah pusat membuat tatu. Pada akhir perbicaraan, hakim bicara mensabitkan perayu-perayu atas kesalahan tersebut dan menjatuhkan hukuman penjara seumur hidup kepada setiap daripada mereka berkuat kuasa dari tarikh tangkap dan sepuluh sebatan, justeru, rayuan-rayuan semasa. Alasan-alasan rayuan yang disandarkan oleh perayu-perayu adalah: (a) sama

ada kes prima facie telah dibuktikan terhadap perayu-perayu; (b) sama ada kawad cam yang diadakan adalah cacat dan tidak dilakukan dengan betul; (c) sama ada pertuduhan terhadap perayu-perayu adalah cacat dan tidak sah di sisi undang-undang — berkenaan dengan isu ini, perayu-perayu berhujah bahawa pertuduhan tersebut tidak sah disebabkan oleh penduaan kerana dua tindakan penculikan yang berbeza (iaitu, abduksi yang salah dan pengurungan yang salah) telah disekalikan ke dalam satu pertuduhan; (d) sama ada terdapat tuntutan wang tebusan; (e) sama ada keterangan perayu-perayu yang membawa kepada penemuan boleh diterima di bawah s 27 Akta Keterangan 1950 ('Akta 56') — berhubung isu ini, perayu-perayu berhujah bahawa hakim bicara dikatakan hanya berpandukan keterangan SP18 semata-mata yang menyatakan bahawa tertuduh pertama telah membawa kepada penemuan sebahagian wang tebusan yang didakwa ditemui di dalam pembesar suara yang diletakkan di ruang tamu dalam premis tersebut; (f) sama ada ketiga-tiga perayu telah bertindak bersama-sama untuk meneruskan niat bersama mereka di bawah s 34 KK; dan (g) sama ada suatu kes telah dibuktikan terhadap perayu-perayu melampaui keraguan munasabah.

Diputuskan, menolak rayuan-rayuan dan mengesahkan sabitan:

(1) Terdapat banyak keterangan yang menunjukkan bahawa unsur-unsur kesalahan penculikan telah dibuktikan oleh responden. Mahkamah mendapati tiada kecacatan pada keterangan pengecaman dan tiada keraguan dalam pengecaman ketiga-tiga tertuduh oleh SP5. Kawad cam telah dijalankan secara teratur, telus dan adil kepada tertuduh-tertuduh. Mahkamah sedar bahawa apabila identiti seseorang tertuduh dibangkitkan, mahkamah harus mengambil kira garis panduan yang ditetapkan dalam *R v Turnbull and others* [1976] 3 All ER 549 semasa menilai kualiti keterangan pengecaman. Berdasarkan fakta dan keterangan, mahkamah berpuas hati bahawa hakim bicara telah mempertimbangkan keterangan mengenai isu kritikal ini pada akhir kes pendakwaan dan telah memberikan penilaian maksimum ke atasnya. Di bawah pemeriksaan balas yang intensif, SP5 dan SP4 kekal teguh dengan jawapan mereka mengenai pengecaman mereka terhadap perayu-perayu. Oleh itu, mahkamah mendapati tiada justifikasi untuk mengganggu penilaian hakim bicara terhadap SP5 dan SP4. Terdapat banyak sokongan ke atas keterangan SP5 di mahkamah oleh SP4 dan kawad cam yang dijalankan oleh polis (SP2) yang jelas telah meningkatkan kredibiliti SP5. Sehubungan itu, mahkamah berpuas hati bahawa pihak pembelaan telah dipanggil dengan betul oleh hakim bicara pada akhir kes pendakwaan (lihat perenggan 14, 18–19 & 22).

(2) Jelas daripada ayat dalam pertuduhan bahawa perbuatan yang didakwa adalah 'abduction and wrongful confinement' seperti yang dinyatakan secara jelas dalam pertuduhan. Pihak pendakwaan telah menerangkan secara khusus perbuatan yang telah dilakukan oleh perayu-perayu. Oleh

itu, perayu-perayu telah betul-betul mengetahui apakah kes yang dikenakan terhadap mereka apabila pihak pendakwaan menutup kesnya dan mereka telah diberi segala peluang untuk mengemukakan pembelaan mereka. Atas sebab itu, terpulang kepada pihak pendakwaan untuk memilih dan membuktikan perbuatan yang berkaitan dalam perjalanan perbicaraan. Oleh yang demikian, mahkamah mendapati tiada prejudis yang dialami oleh perayu-perayu dalam menyediakan pembelaan mereka. Justeru itu pertuduhan tersebut tidak cacat atau batal. Malah, hakim bicara yang bijaksana dalam penghakimannya telah mendapati bahawa pihak pendakwaan telah membuktikan ketiga-tiga elemen abduksi, pengurungan yang salah dan penahanan yang salah. Oleh itu, mahkamah mendapati bahawa hujahan oleh peguam perayu-perayu adalah jelas tidak mampan (lihat perenggan 24–26).

(3) Mahkamah mendapati keterangan SP20 bahawa terdapat tuntutan wang tebusan sememangnya boleh dipercayai. SP20 tidak mempunyai tujuan atau alasan untuk mereka-reka keterangannya terhadap mereka. Sokongan untuk ini boleh didapati dalam keterangannya seperti lampiran 8 rekod rayuan Jilid 2(2) ms 306-313 (lihat perenggan 27).

(4) Walaupun SP18 tidak merekodkan butiran dalam mana-mana nota sezaman, atau mengeluarkan apa-apa laporan penahanan untuk menyokong dan mengesahkan maklumat yang diberikan oleh tertuduh pertama, fakta bahawa tertuduh pertama menunjuk ke arah pembesar suara yang membawa kepada penemuan wang tebusan tersebut termasuk dalam skop s 27 Akta 56. Bagi tertuduh ketiga, ia jelas daripada keterangan DSP Mohamad Shajidan bin Abdul Shukor ('SP19') bahawa apabila tertuduh ketiga ditahan, tertuduh memberi maklumat kepadanya sehingga membawa kepada penemuan wang tebusan tersebut. Selepas itu, SP19 membuat laporan polis mengenai maklumat yang diberikan. Oleh itu, s 27 Akta 56 terpakai di sini. Ringkasnya, mahkamah bersetuju dengan dapatan hakim bicara mengenai isu s 27 Akta 56. Dapatan fakta sedemikian semestinya perlu kekal tidak diganggu (lihat perenggan 33 & 35–36).

(5) Seksyen 34 KK adalah peraturan keterangan dan tidak mewujudkan kesalahan substantif. Niat bersama adalah persoalan fakta. Bukti niat bersama adalah perkara inferens daripada keadaan. Mens rea sebagai elemen mental atau keadaan minda biasanya tidak dapat dibuktikan melalui keterangan langsung. Ia boleh didapati daripada keterangan tidak langsung dalam setiap kes tertentu. Keterangan terbaik untuk mewujudkan niat bersama adalah untuk melihat kelakuan perayu sebelum, pada masa dan selepas kesalahan. Semua perbuatan ini apabila digabungkan bersama membuktikan hubungan mereka dengan kesalahan tersebut. Penglibatan perayu-perayu boleh didapati antara lain daripada keterangan berikut: (a) SP5 boleh mengecam ketiga-tiga

tertuduh dan mengesahkan peranan yang dimainkan oleh setiap daripada mereka semasa abduksi dan kurungan tersebut; (b) kronologi kejadian dan cara keseluruhan kejadian tersebut dilaksanakan juga menunjukkan bahawa ia telah dirancang dengan baik; (c) semua perbuatan ini apabila digabungkan bersama membuktikan niat bersama mereka; dan (d) beberapa wang kertas yang ditemui oleh polis daripada maklumat yang diberikan oleh perayu-perayu sepadan dengan nombor siri timbunan wang yang diberikan sebagai wang tebusan (lihat perenggan 38 & 42).

(6) Pemerhatian rapi terhadap penghakiman hakim bicara yang bijaksana menunjukkan bahawa beliau telah mempertimbangkan secara kehakiman pembelaan yang dikemukakan oleh perayu-perayu dan menimbang semua keterangan mereka sebelum membuat dapatan fakta yang pasti. Hakim bicara yang bijaksana tidak terkhilaf dalam dapatannya apabila beliau banyak bergantung pada keterangan yang diberikan oleh SP5 dan selepas memberikan penghargaan yang mencukupi kepada keterangan lisan dan keterangan dokumentar yang lain secara keseluruhannya. Mahkamah tidak mendapati apa-apa kecacatan dalam keputusan hakim bicara yang bijaksana. Di samping itu, adalah jelas daripada penghakimannya bahawa hakim bicara yang bijaksana telah dengan betul, wajar dan inklusif mengarahkan fikiran kehakimannya kepada pihak pembelaan, mempertimbangkan versi mereka dan menjelaskan dengan secukupnya mengapa beliau memilih untuk tidak mempercayai keterangan pembelaan. Mahkamah tidak dapat melihat bagaimana hakim bicara boleh dikatakan salah dalam dapatan faktanya. Beliau mempunyai kelebihan untuk melihat dan mendengar para saksi. Berdasarkan premis tersebut, mahkamah mendapati tiada salah arah di pihak hakim bicara yang bijaksana yang memerlukan campur tangan rayuan (lihat perenggan 46–47).]

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336; [1987] 1 CLJ 540, SC (refd)

DA Duncan v PP [1980] 2 MLJ 195, FC (refd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 1 CLJ 138; [1983] CLJ Rep 721, FC (refd)

Dorai Pandian a/l Munian & Anor v PP [2009] 4 MLJ 525; [2012] 10 CLJ 22, CA (refd)

Duis Akim & Ors v PP [2014] 1 MLJ 49, FC (refd)

Farose bin Tamure Mohamad Khan v PP and other appeals [2016] 6 MLJ 277; [2016] 9 CLJ 769, FC (refd)

Krishna Rao Gurumurthi & Anor v PP and another appeal [2007] MLJU 888; [2007] 4 CLJ 643, CA (refd)

Krishna Rao a/l Gurumurthi v PP and another appeal [2009] 3 MLJ

643; [2009] 2 CLJ 603, FC (refd)
PP v Lim Chooi Huat & Anor [2011] MLJU 852, HC (refd)
PP v Azman bin Ismail & Ors [2007] 3 MLJ 628; [2007] 10 CLJ 469, HC (refd)
PP v Norazman bin Ibrahim [2005] MLJU 546; [2006] 8 CLJ 462, HC (refd)
PP v Roslizam bin Abdul Azis & Anor [2005] 1 MLJ 261; [2004] CLJU 196; [2004] 1 LNS 196, HC (refd)
R v Turnbull and others [1976] 3 All ER 549, CA (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 CLJ 149, FC (refd)
Yahaya bin Mohamad v Chin Tuan Nam [1975] 2 MLJ 117; [1975] 1 LNS 195; [1975] 1 MLRA 322, PC (refd)
Zulkifli @ Sakun bin Ahmad Endin Chun lwn Pendakwa Raya [2013] 1 MLJ 733; [2012] 1 LNS 435, CA (refd)

Legislation referred to

Evidence Act 1950 ss 7, 27, 133A
Kidnapping Act 1961 ss 2, 3(1)
Penal Code ss 34, 339, 340, 362

Appeal from: Criminal Trial No PA-45C-1–03 of 2017 (High Court, Georgetown)

(Kit & Assoc) for the appellant.
(GC Tan & Co) for the appellant.
(Kumar & Co) for the appellant.
Norzilati Izhani Zaonal @ Zainol (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azmi Ariffin JCA:

INTRODUCTION

[1] This is an appeal against the conviction and sentence of the three appellants on the charge under s 3(1) of the Kidnapping Act 1961 read together with s 34 of the Penal Code.

[2] All the three appellants were found guilty and convicted of the offence by the Penang High Court. They were each sentenced to life imprisonment with effect from the date of arrest and ten strokes of whipping.

[3] Aggrieved by the conviction and sentences given by the High Court, the three appellants appeal to this honourable court.

[4] Appeal No P-05(SH)-547–11 of 2022 by the first and third appellant; and

[5] Appeal No P-05(SH)-548–11 of 2022 by the second appellant.

[6] To facilitate the determination of this two separate appeals, we find it more convenient to decide these appeals in a single judgment as they are interrelated.

[7] We will for convenience in this appeal, refer the three appellants in the manner they were referred to in the High Court ie Quaik Yong Lai (first accused), Goh Jit Ee (second accused) and Heng Tian Chuan (third accused).

THE CHARGE

[8] The charge preferred against the three accused reads as follows:

> Bahawa kamu bersama-sama pada 29/6/2016 jam lebih kurang 3.50 petang, di hadapan Pusat Tuisyen Muzik alamat No. 57 Taman Jernih Bukit Mertajam, di dalam Daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang, di dalam mencapai niat kamu bersama, bagi maksud mendapatkan wang tebusan sebanyak RM1,750,000, telah melarikan dan mengurung secara salah seorang kanak-kanak bernama Khor Jia Han, My Kid: 062–1027–0551 yang berumur 10 tahun. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 3 Akta Culik 1961 (Akta 365) dan dibaca bersama seksyen 34 Kanun Keseksaan.

THE PROSECUTION'S CASE

[9] The case of the prosecution was well laid out by the learned trial judge in his grounds of judgment which is reproduced herein:

(a) in this case the prosecution called 22 witnesses to prove its case. The witnesses can be grouped according to the evidence given. The first group of witnesses are the victim (SP5), the aunty (SP4), the victim's mother (SP20) and the victim's father (SP13);

(b) a sum total of the evidence of these four witnesses showed that the victim was on the day and time question on the way to a tuition class by car driven by SP4. At the tuition center the victim as witnessed by SP4, was forced into another car by three assailants identified as the three accused;

(c) the victim was confined in a premise until nightfall and thereby released around midnight at a bus stop. SP13 found the victim at the bus stop and brought him home;

(d) between the victim's confinement and release, SP20 was contacted for ransom money which she managed to collect a sum of RM1.75m. This

money was brought to be delivered by SP20 after she had photographed the stacks of money to be delivered, to a place as directed by way of phone call;

(e) the second group of witnesses are the police officers and this included the police officer (SP1) who recorded the first information report (FIR). As a result of this FIR and after investigation by the Investigating officer (SP22), the three accused were arrested by various police officers.

(f) the arresting police officers (SP18 and SP19) testified the manner in which the three accused were arrested. The arresting officers also testified that during arrest the three accused had given information leading to discovery of large sums of money;

(g) upon arrest of the three accused two police officers SP2 and SP12 conducted an identification parade in which the victim and SP4 identified the three accused as the perpetrators of the abduction and the victim identified the three accused and their role in his confinement at the premise he was taken to;

(h) the investigating officer (SP22) in his investigation sent some exhibits recovered at the place of abduction and confinement as well as the places where the money was found to forensics and the chemist. Upon analysis the chemist SP16 found DNA matching that of one of the accused on a cigarrete butt found at the place of confinement;

(i) SP22 also during investigation noted that some of the notes discovered from the information given by the three accused matched the serial numbers of the stack of money given as ransom photographed by SP20;

(j) a final group of witnesses were civilians SP6, SP7, SP8 and SP11 who testified that the three accused had left with them large sums of money on the pretext of safe keeping. Another civilian witness SP14 testified that it was the three accused who had rented from her the premise in which the victim was kept; and

(k) rhe prosecution also led evidence through SP22 to rebut an alibi notice given by the second accused. The second accused claimed that at the time of abduction he was having himself tattooed by a person whom he named. The police verified that the person mentioned by the second accused could not be found. In short, the notice of alibi of the second accused could not be entertained.

SUMMARY OF THE HIGH COURT FINDINGS AT THE END OF PROSECUTION'S CASE

[10] The learned High Court judge in his judgment held among others as follows:

(a) credibility and competency of witness:

(i) the victim (SP5) was only ten years old during the incident and

about 13 years old when he testified. The High Court judge had considered s 133A of the Evidence Act 1950; and

(ii) after questioning SP5, the learned trial judge's was satisfied that the victim understood the oath and its effect fully. The victim was also a competent, consistent, confident, truthful and intelligent witness.

(b) identification of the accused:

(i) even though all the accused were wearing mask and the victim was blindfolded, the victim had quietly lifted the blindfold and had clearly seen the faces of the accused. Also, at one time while in confinement when he was given food, one of the accused had removed his mask to smoke so he saw the face clearly;

(ii) no flaws when the police conducted the identification parade. It was done in a manner which is fair, transparent with no advantage given to the victim over the suspects to be identified;

(iii) the victim and SP 4 were not shown photographs of the accused beforehand nor had they the opportunity to see the accused before entering the place where the identification was held;

(iv) the victim and SP4 were not coached by the investigating officer or anyone else as to whom to identify at the identification parade;

(v) the police officers conducting the identification parade had no prior knowledge of the full facts of the case and were independent of any ongoing investigations of the case; and

(vi) the participants of the identification parade although were not of the same age or height and size of the accused but they were the best match available to participate during the identification parade. The diversity between the participants will not necessarily make it easier for the victim or SP4 to identify the accused amongst the participants. The victim not only could identify all the accused in court but she could also confirm the role played by each of the accused during abduction and confinement. This showed that the victim had made no mistake in identifying all the three accused at the identification parade.

(c) corroboration by SP4:

(i) the victim's evidence of the narrative of the incident at the time of the incident was fully corroborated by SP4. The trial judge found SP4 to be a truthful witness.

(d) SP20's evidence:

(i) the trial judge found that the purpose of the victim's abduction was

clearly to demand for ransom. On this demand for ransom the SP20's evidence was hardly challenged. SP20's evidence was accepted by the court as truthful and credible. More so when the money recovered from the accused matched the serial numbers of the notes shown in the photographs taken by her; and

(ii) the trial judge ruled that the photographs taken were admissible and there were no evidence of any editing or tampering. The photograph showed the serial number of the notes on the top of the stack.

(e) money seized by the police:

(i) the trial judge was satisfied that the money was discovered on the information given by the accused. The police had no prior information or the knowledge of the said money before the arrest of the accused. The money was discovered on the information given by the accused. Section 27 of the Evidence Act 1950 applies;

(ii) the existence of the large sums of money clearly indicates all the accused knowledge of the sums of money which is part of the ransom given by SP20. By conduct it indicates that the accused are complicit in the abduction and confinement of the victim. Section 7 of the Evidence Act 1950 applies;

(iii) against the third accused there is also the evidence from his friends and his own father who were suspicious as to where he got such large sums of money. All of them testified in court and the trial judge could not detect any untruthfulness in their evidence; and

(iv) the second accused notice of alibi was shown to be unverified during the police investigation and therefore could not be accepted.

(f) the defence's case:

(i) all the accused denied that they had abducted or confined the victim as alleged;

(ii) the money was discovered not on the information given by them but instead the money was recovered during the investigation;

(iii) all the three accused denied knowledge of the money recovered; and

(iv) the third accused in addition to the denial testified that at the time of the abduction he was getting himself tattooed by a person named Peter Wong at a tattoo parlour.

A MAIN ISSUE FOR DETERMINATION

[11] Before us, although the separate petition of appeal contained several grounds, however we will combined and addressed all the issues together.

B **[12]** We will for convenience in this appeal combined and addressed all the issues together as they are connected. The grounds relied on by them were:

(a) whether a prima facie case has been proven against the appellant;

C (b) whether the identification parade held were flawed and not properly done.

(c) whether the charge against the appellants is defective and bad in law;

(d) whether there is a demand of ransom;

D (e) whether the appellants' evidence leading to discovery is admissible under s 27 of the Evidence Act 1950;

(f) whether all the three appellants had acted together in furtherance of their common intention under s 34 of the Penal Code; and

E (g) whether a case has been proven against the appellants beyond reasonable doubt.

The relevant provision of laws:

(i) s 27 of the Evidence Act 1950 provides as follows:

F

> 27 How much of information received from accused may be proved
>
> (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

G

(ii) s 34 of the Penal Code provides as follows:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

H

(iii) s 2 of the Kidnapping Act 1961 defines 'ransom' as:

> 'ransom' means any money, price or consideration paid or demanded for the release of a person abducted or wrongfully confined or wrongfully restrained.

I

(iv) s 3(1) of the Kidnapping Act 1961 reads as follows:

> (1) Whoever, with intent to hold any person for ransom, abducts or wrongfully confines or wrongfully restrains such person shall be guilty of an offence and shall be punished on conviction with death or imprisonment for

life and shall, if he is not sentenced to death, also be liable to whipping.

(v) s 339 of the Penal Code: Wrongful restraint:

Whoever voluntarily obstructs any person, so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

(vi) s 340 of the Penal Code: Wrongfully confinement

Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said 'wrongfully to confine' that person.

(vii) s 362 of the Penal Code: Abduction

Whoever by force compels or by any deceitful means induces any person to go from any place, is said to abduct that person.

OUR DECISION

[13] Most of the issues raised will be taken together. There are six critical issues raised cumulatively by the learned counsels for all the accused persons, touching on the findings by the learned trial judge pertaining to the following:

Whether the trial judge was right when he found a prima facie case had been established

[14] At the close of the prosecution case, the learned trial judge was satisfied that the prosecution had successfully established a prima facie case against the accused. Gleaning from the entire evidence, there was overwhelming evidence that the ingredients of the offence of kidnapping has been proven by the respondent. The reason is obvious. The material evidence given by SP5 (encl 7 record of appeal Vol 2 pp 25–55) in his examination-in-chief is reproduced herein:

TPR: Baik, saya nak tanya Jia Han, pada 29.6.2016, hari itu, Jia Han pada awal pagi pada 29.6.2016 pergi ke mana?

SP5: Pada pagi saya ada di rumah.

TPR: Pada waktu petang?

SP5: Pergi ke tuisyen.

TPR: Pukul berapa tuisyen hari itu?

SP5: Pukul 3 lebih hampir pukul 4.

TPR: Jia Han pergi tuisyen dengan apa?

SP5: Kereta.

TPR: Pergi dengan siapa?

A SP5: Aunty Ang.

TPR: Jia Han, pada hari itu Aunty Ang datang pukul berapa?

SP5: 3.30

TPR: Aunty Ang Naik kereta apa tahu tak?

B SP5: Proton Wira warna hijau dalam.

TPR: Pusat tuisyen Jia Han dekat mana?

SP5: Taman Jernih.

...

C TPR: Bila Jia Han turun dari pintu sebelah kiri, apa yang terjadi?

SP5: Ada orang tangkap saya. Dia peluk saya dan kemudian lari.

Dia pakai T-shirt dan jeans. Saya ada tenguk muka dia. Tidak nampak muka dia. Dia pakai mask warna biru. Mask tutup dari hidung ke dagu. Kepala dia tidak ada
D tutup apa-apa. Orang itu datang dari kereta, ada di sebelah kereta aunty tetapi arah bertentangan. Selepas dia peluk saya, dia lari ke arah kereta kemudian masukkan saya ke dalam kereta di bahagian belakang.

...

E SP5: Pada waktu itu saya nampak ada orang tahan pintu Aunty tak bagi Aunty keluar dari kereta. Saya menoleh dan saya nampak orang yang halang pintu kereta. Saiz tegap dan ada pakai mask. Orang yang peluk saya ada sekali dalam kereta. Dia ikat kedua-dua tangan saya dengan cable tie di bahagian ke dalam kereta, ada seorang pemandu kereta. Orang yang tolak pintu kereta Aunty Ang juga masuk ke dalam kereta di sebelah pemandu.

F TPR: Apa yang dia buat dengan Jia Han selain ikat tangan?

SP5: Tutup mata saya dengan kain. Saya nampak muka dan badan dia. Pemandu yang di hadapan itu rambut panjang dan bersaiz badan kurus dan memakai mask. Saya sempat nampak bahagian muka dia sebelum mata saya di tutup. Saya tengok
G orang itu bila dia menoleh ke belakang bercakap.

...

SP5: Saya nampak orang yang peluk saya dan duduk di sebelah saya sekali lagi. Mereka pergi ke satu tempat lain untuk tukar kereta.

...

H SP5: Dalam keadaan mata tertutup, saya nampak sikit-sikit sebab saya tolak kain warna hitam ke bahagian atas so saya boleh peeping mengintai. Saya buka bintai itu sebelum tukar kereta. Saya nampak ketiga-tiga mereka.

...

I SP5: Dari tempat tukar kereta sehingga van berhenti adalah dalam 20–30 minit. Saya kemudian di bawa turun dan saya dibawa naik tangga. Mereka bagi saya duduk di atas lantai dan ikatan mata saya dibuka. Yang bawa van itu rupanya masih pakai mask juga. Jarak saya dengan dua orang lagi dalam beberapa

...

SP5: Suasana bilik gelap namun ada cahaya dari luar. Walaupun dalam bilik tidak terang, saya masih boleh nampak. Orang yang halang pintu minta nombor telefon ayah saya. Saya bagitau bapa di luar negara. Semasa dia cakap, saya lihat muka dia. Jarak saya dengan dia tak sampai satu meter. Dia tanya nombor telefon ibu saya dan saya bagi dan saya lihat muka dia. Dia telefon ibu saya. Orang yang tangkap saya yang pakai mask ada lubang ada di sebelah saya. Saya tak tenguk dia.

...

SP5: Masa dia bercakap dengan ibu saya, saya bagitau saya ada di tangan mereka dan dia minta saya bercakap dengan ibu saya. Saya bagitau saya selamat dan cepat bawa saya keluar. Lepas dia ambil balik telefon dan saya nampak dia dan dia turun ke tingkat bawah dan dia sambung cakap dengan ibu saya.

...

SP5: Lepas saya bangun dari tidur jam 6 lebih, 7 petang orang yang pakai mask yang ada lubang hanya duduk di sebelah saya. Saya ada tenguk muka dia. Saya bagitau dia saya sangat lapar dan minta beli saya makanan. Orang yang duduk di sebelah saya telefon orang yang telefon ibu saya membeli makanan untuk saya dan balik. Orang yang tahan pintu naik ke atas datang ke tingkat atas. Dia tidak pakai mask. Saya tenguk muka dia. Jarak saya dengan dia 1 meter lebih. Lepas itu dia ambil mask pakai. Keadaan bilik masa itu ada lampu. Lepas makan saya nampak orang yang jaga saya hisap rokok di dalam bilik. Dia tidak pakai topeng. Jarak saya dengan dia dalam 2 meter.

...

SP5: Bila saya bangun tidur pukul 10 lebih dekat pukul 11, orang yang jaga saya ada di sebelah saya. Lepas 20–30 minit, dia bawa saya turun ke bawah dan dia bagitau saya masa untuk beredar. Saya tenguk dia dalam jarak lebih kurang 1 meter. Kemudian, dia tutup muka saya dengan kain. Tangan saya tidak diikat. Kemudian dia bawa saya naik kereta. Saya duduk di belakang. Dia duduk di sebelah saya. Saya tarik kain dan mengintai dan saya nampak driver. Kereta pergi ke satu perhentian bas.

...

SP5: Bila sampai di perhentian bas, saya dibawa turun oleh orang di sebelah saya. Dia letak saya di perhentian bas dan kira 15 saat. Selepas 15 saat dia suruh saya buka kain. Tetapi sebaik sahaja mereka beredar, saya terus buka kain. Saya nampak kawasan ada pasar, taman rumah dan padang. Saya biasa pergi ke situ. Kawasan itu dekat rumah. Bila buka mata, saya tunggu bapa saya. Bapa datang jam 11 lebih pukul 12. Bapa datang pakcik kedua saya iaitu Khor Chong Huan dengan kereta. Saya dan bapa pergi ke Balai Polis Bukit Mertajam dan rakam percakapan.

...

SP5: Pada hari pengecaman dan masa pengecaman dibuat ada satu cermin, ada orang di dalam cermin bersama dengan nombor kemudian dia suruh saya cam nombor dan sebut nombor itu. Saya nampak ada 10–20 orang. Semua lelaki. Saya boleh cam orang yang saya tenguk hari itu. Saya tenguk dia 4 kali. Pergi kali pertama, dalam cermin itu, mereka tak ada pakai mask. Saya cam orang yang

mula-mula bawa kereta, orang jaga saya dan orang yang beli nasi. Saya cam 3 orang dalam kawat cam. Ada juga kawat cam pakai mask dan saya boleh cam. Masa kawad cam kedudukan 3 orang itu tak sama.

SP5: Saya boleh cam orang yang bawa kereta awal-awal itu. Dia rambut panjang dan bahagian dahi dia. Saya boleh cam orang yang beli nasi sebab masa dia naik atas dia tak pakai topeng. Saya nampak keseluruhan muka dia. Orang yang angkat saya dalam kereta dan jaga saya sepanjang masa saya cam kerana masa dia hisap rokok dia ada tarik topeng ke bawah. Sebelum saya cam 4 orang dalam kawad cam, polis tak ada tunjuk orang yang tangkap saya.

TPR: Kalau saya tunjuk orang tersebut di mahkamah hari ini, Jia Han boleh cam ke? Siapa yang beli makanan, tolak kereta Aunty Ang? Siapa hisap rokok? Siapa rambut panjang, boleh cam dalam mahkamah.

SP5: Boleh.

...

TPR: Jia han tengok 3 orang. Siapa tolak pintu, beli makan?

SP5: Paling kanan baju kelabu. OKT 3 Heng Tian Chuan dicamkan.

TPR: Siapa yang rambut panjang, bawa kereta? Kereta pertama yang kena culik?

SP5: Di bahagian tengah.

TPR: Siapa jaga Jia Han sepanjang masa? Yang nampak dia hisap rokok?

SP5: Di sebelah kiri.

TPR: Ketiga-tiga OKT dicamkan Yang Arif.

[15] During cross-examination by the learned counsel for the second accused, SP5 (encl 7 record of appeal Vol 2 pp 137–149) said:

SP5: Saya telah pergi ke balai polis Bukit Mertajam sebanyak 2 kali. Pertama untuk membuat rakaman percakapan dan kedua untuk membuat pengecaman. Rasanya 1 minggu selepas saya beri rakaman percakapan kepada polis saya pergi ke balai polis pada sebelah petang untuk membuat pengecaman. Saya pergi dengan ayah saya dan Aunty Ang untuk membuat pengecaman. Kami pergi dengan kereta yang sama. Bila saya tak ingat.

...

SP5: Bila kami sampai di balai polis, ada anggota polis yang bawa kami naik ke tingkat atas. Kami berada di dalam sebuah bilik. Aunty pergi buat pengecaman dulu. Selepas Aunty saya. Saya buat pengecaman 4 kali. 2 kali tanpa mask dan 2 kali dengan mask. Dari masa saya sampai ke balai polis sampai tamat pengecaman lama masa lebih kurang 1 jam.

...

SP5: Masa di dalam bilik Aunty tak katakan pada saya samada Aunty ada pengecaman atau tidak. Masa dalam bilik tersebut, pegawai polis tidak ada tunjukkan 4 gambar- gambar suspek kepada saya. Saya buat pengecaman di sebuah bilik yang lain. Jarak dari bilik saya dan Aunty Ang tunggu dengan bilik pengecaman adalah dekat lebih kurang 50 meter dan di tingkat yang sama.

...

SP5: Semasa saya tiba di bilik pengecaman saya berjumpa dengan seorang pegawai berbangsa cina, nama saya tak tahu. Dia hanya suruh saya cam orang. Dia tak ada beritahu saya orang-orang tersebut adalah siapa. Bilik pengecaman itu ada kurang daripada 15 orang. Dia suruh saya cam. Saya camkan.

SP5: Masa saya masuk dalam bilik tersebut, ASP Cheok tidak ada beritahu saya yang saya kena pilih satu orang dua orang dalam senarai tersebut. Masa saya masuk dalam bilik tersebut, ada satu cermin satu hala. Saya boleh nampak sana tapi orang di belakang tak boleh nampak saya. Rasanya cermin itu tinted. Jarak saya dengan cermin lebih kurang 3 meter. Masa saya masuk bilik itu, bebelasan orang tersebut sudah ada ke dalam bilik. Mereka semua Cina. Ada yang gemuk, kurus, tinggi, rendah, rambut panjang dan rambut pendek. Mereka berdiri di sebelah bilik belakang cermin. Jarak mereka dari cermin tersebut di bilik sebelah lebih kurang 3 meter juga. Tidak ingat suspek-suspek dan peserta-peserta kawad cam yang berjambang dan bermisai. Sejurus saya masuk saya lihat semua selepas itu saya camkan.

PEG2: Berapa lama kamu ambil masa untuk memperhatikan dekat situ? Sekejap?

SP5: Lebih kurang 1 minute. Untuk lihatkan semua.

PEG2: Kamu tidak perhatikan bahagian dahi? Rambut.

SP5: Lihat muka.

PEG2: Pertama kali kamu buat tanpa mask setuju?

SP5: Benar.

PEG2: Tapi pada hari tersebut masa kamu diculik mereka ketiga-tiga ada pakai mask setuju?

SP5: Setuju. Masa saya kena tahan mereka ada pakai mask, masa pengecaman kalau tak silap kali ketiga, keempat mereka pakai mask. Tapi pengecaman pada kali pertama, kedua tak pakai mask.

SP5: Saya boleh cam OKT Kedua yang berambut panjang yang pandu kereta di depan tuisyen itu kerana saya nampak. Saya setuju bukan semua peserta-peserta kawad cam berambut panjang. Saya tidak tahu ada satu lagi suspek seiras dengan OKT Kedua juga berada di sana.

...

PEG2: Semasa kamu cam kamu dapat cam OKT kedua. Kamu ada apa-apa distinctive mark dekat muka OKT?

SP5: Tidak ada.

PEG2: Jadi saya katakan kepada kamu kamu telah tersilap dengan cam OKT kedua untuk kawat cam yang pertama tanpa mask sebab dalam ada seorang lelaki yang muka, paras muka, bentuk badan dan rambut yang seiras dengan OKT kedua?

SP5: Tidak setuju.

PEG2: Semasa kamu buat pengecaman kali kedua dengan mask berapa lama? Juga kurang dari seminit kamu dapat camkan dengan mask.

PEG2: Jadi kamu juga seimbas pandang sahaja kesemua-semua suspek dengan mask? Lepas itu kamu beritahu ASP Cheok ini orang.

SP5: Benar selepas saya kenal pasti.

PEG2: Agak berapa lama?

SP5: Saya tidak pasti.

Mahkamah: Masa pertama dan kedua kali dia cam, adakah orang itu berdiri di tempat yang samakah?

SP5: Tidak sama.

...

SP5: Saya boleh cam bahasa Mandarin. Saya tidak kerap baca surat khabar. Ibu-bapa saya, kawan, rakan sekolah, tidak kata pada saya bahawa suratkhabar-suratkhabar ada siarkan berita tentang penculikan saya. Aunty Ang ada kata pada saya. Aunty Ang tidak ada tunjuk sürat kabar pada saya. Aunty Ang ada beritahu saya kejadian penculikan tersebut telah dilaporkan dalam surat khabar Bila dia beritahu saya, saya tidak ingat. Aunty Ang tidak ada beritahu saya gambar-gambar suspek telah disiarkan di akhbar.

...

PEG2: Jadi saya katakan kepada kamu bahawa kamu telah nampak gambar-gambar suspek sehari sebelum kamu pergi ke balai polis untuk membuat pengecaman, setuju?

SP5: Tidak setuju.

...

PEG2: Saya katakan kepada kamu kamu telah tersilap cam OKT kedua pada masa tersebut?

SP5: Tidak setuju.

[16] During cross-examination by the learned counsel for the first and second accused, SP5 (encl 7 record of appeal Vol 2 pp 149–157) futher said as follows:

SP5: Selepas saya diselamatkan, selang 3–4 hari saya telah berjumpa dengan pihak polis menceritakan apa yang berlaku pada saya. Masa itu saya masih takut, gementar dan risau apa yang berlaku ini.

PEG1&3: Kamu setuju dengan saya kalau pada masa itu pihak polis ada minta kamu lakarkan, I use the, my lord I use the legal term photofit. Kamu boleh memberi deskripsi orang tersebut dengan lebih tepat lagi kerana ingatan kamu masih lagi segar di minda kamu?

SP5: Saya setuju.

PEG 1&3: Setuju ya okay very good. Maksudnya kamu boleh memberi deskripsi tentang kalau masa itulah kalaulah masa itu pihak polis minta kamu lakarkan memberi photofit, lukis mata mereka, rambut mereka pendek? Panjang? Muka mereka adakah ia bersegi bujur? Bulat atau panjang? Dagu yang panjang atau

hidung yang muncung, matanya kening macam mana semua perkara itu kamu boleh lakarkan atau memberi descripsi yang lebih tepat lagi kerana kejadian itu baru sahaja berlaku betul?

SP5: Setuju.

...

PEG1&3: Tapi kamu setuju apa yang berlaku ini seperti yang kamu beritahu pada hari itu masa kamu ditangkap dan dibawa masuk dalam kereta adalah perkara yang berlaku dengan begitu pantas. It happened quick, so fast ikut keterangan kamu pada hari itu?

SP5: Setuju.

PEG1&3: Dan pada kebanyakkan masa kamu memang dalam keadaan blindfolded?

SP5: Tidak.

PEG1&3: Daripada keterangan kamu kamu katakan kamu telah pun mata kamu telah ditutup, blindfolded?

SP5: Semasa tangkapan ada ditutup mata dan selepas sampai di tempat yang mengurung saya mata saya dibuka.

PEG1&3: Dan pada masa itu juga kamu setuju dengan saya kamu dalam keadaan trauma, takut, risau, gementar pada masa itu. Fikiran kamu dalam keadaan bercelaru?

SP5: Saya rasa nervous tapi pemikiran saya masih waras.

...

PEG1&3: Okay baik, so dan kamu setuju dengan saya orang-orang yang melakukan perkara ini kamu tidak pernah melihat mereka sebelum hari kejadian?

SP5: Tidak pasti, rasanya tidak pernah jumpa mereka.

PEG1&3: Tidak pernah jumpa okay dan kamu setuju dengan saya bahawa kalau kamu ada memberi photofit tersebut kepada pihak polis, ia akan membantu kamu dalam process membuat pengecaman dalam kawad cam?

SP5: Jika ada, ya. Setuju.

PEG1&3: Setuju ya okay, sebab-sebab deskripsi kamu, dua tiga hari selepas kejadian kamu kata masih lagi segar kamu dapat lakarkan bentuk mata, bentuk rambut, bentuk muka, hidung, dagu dan sebagainya dan ia semestinya akan bantu kamu melihat samada lelaki-lelaki dihadapan kamu itu memang adalah salah satu daripada mereka daripada photofit betul?

SP5: Tidak pasti.

PEG1&3: Dalam semua kawad cam tersebut ya ada tidak kamu pakaian yang dipakai oleh semua peserta-peserta dalam kawad cam itu? Tidak ingat. Okay, maksud saya make it easier for you, maksud saya adakah mereka berpakai pakaian seragam samada warna oren, warna unggu atau pakaian berlainan?

SP5: Tidak ingat.

PEG 1&3: Adakah mereka memakai kasut? Rasanya tak ada. Semua tak pakai kasut?

SP5: Rasanya semua tidak pakai kasut.

PEG 1&3: Okay. Semua tidak pakai kasut, bagus. Jadi tiap-tiap kali kamu pergi buat kawad cam kamu lihat kesemua mereka ada berkaki ayam, kesemua mereka berkaki ayam, tiap-tiap kali kawad cam mereka berkaki ayam?

SP5: Rasanya Ya.

PEG 1&3: I repeat the question sorry, please bear with me yang arif. You see saya kata kepada kamulah saya orang india. Kalau semua orang berbadan seperti saya, warna kulit seperti saya, berdiri berdepan dengan kamu, kepala seperti saya tak ada misai, tak ada janggut, semua kami akan nampak sama. Tapi kalau kami berpusing disebelah kiri, berdepan dengan kamu, berpusing di sebelah kanan itu akan memberi kamu keadaan yang lebih baik untuk membuat pengecaman yang lebih baik. Definitely you will give a better opportunity to identify the person?

SP5: Setuju Yang Arif.

PEG 1&3: Now sebelum pergi ke tadi bila disoal oleh sahabat saya, kamu kata kamu, bapa kamu dan mak cik kamu telah pergi ke balai polis bersama-sama, betul?

SP5: Benar.

PEG 1&3: Bila perjalanan ke balai polis, saya yakin dan percaya kamu, bapa kamu dan aunty telah pun mula bincang kerana kamu pergi ke sana untuk tujuan kawad cam. Sudah mula bincang dalam kereta?

SP5: Tidak ada.

PEG1&3: Saya ulangi balik soalan. Bila kamu pergi ke sana bersama dengan aunty, bersama dengan bapa kamu, Jia Han setuju dengan saya kamu ada bincang sedikit-sedikit apa sebab pergi ke sana kan?

SP5: Tidak ada.

PEG 1&3: Okay nak pergi cam orang ini? Nak pergi cam orang-orang yang telah culik dan sebagainya?

SP5: Tidak ada bincang.

PEG 1&3: Saya katakan, I will just put it to him. Bahawa kamu berpeluang untuk berbincang dalam perjalanan dalam kereta, ketika berada di balai polis sehinggalah selesai, kamu ketiga-tiga berpeluang untuk bertukar maklumat, berbual dalam bahasa Mandarin yang tak mungkin difahami oleh anggota-anggota di situ tentang lelaki lelaki yang terlibat dalam perkara ini. Yang mungkin terlibat yang sepatutnya dicamkan.

SP5: Boleh ada peluang tetapi kami tidak berbuat demikian.

...

PEG 1&3: Kamu tidak memberi sebarang photofit, dan kamu juga setuju dengan saya kalau ada photofit lebih baik untuk kamu buat pengecaman dan kamu juga setuju semasa pengecaman orang itu tidak berpusing ke kiri, tidak berpusing ke kanan. Kalau memusing ke kiri memusing ke kanan lebih baik so kamu setuju dengan saya, pengecaman yang kamu buat sekali sekilas pandang itu pengecaman yang tidak tepat.

SP5: Tidak setuju.

[17] During re-examination by the learned deputy public prosecutor, SP5 (encl 7 record of appeal Vol 2 p 158) said:

TPR: Jia Han peguam OKT kedua ada bertanya, Dato Kumarendran yang a bit tua itu ada bertanya waktu kepada kamu, when he was grabbing you could have seen what happen to aunty's car. Jia Han jawab tak setuju. Bolehkah Jia Han jelaskan mengapa Jia Han tak setuju dengan cadangan peguam?

SP5: Kerana dia peluk saya dan kepala saya boleh menoleh.

TPR: Seterusnya peguam yang sama bertanya, mencadangkan you cannot see what happens to aunty and Jia Han jawab tak setuju. Boleh Jia Han jelaskan mengapa tak setuju dengan cadangan peguam tersebut?

SP5: Kerana saya menoleh, kepala saya boleh menoleh.

Mahkamah: Dan dia nampaklah?

SP5: Ya, saya nampak. Ya, Okay.

TPR: Okay Jia Han kita pergi kepada semasa Jia Han di tempat kejadian, tempat ditahan ya. Peguam ada bertanya Jia Han ada tidur, Jia Han setuju Jia Han ada tidur. And then selepas Jia Han bangun adakah it is already dark, Jia Han jawab tidak. Seterusnya peguam ada bertanya lampu tidak dibuka, Jia Han jawab tidak setuju. Bolehkah Jia Han jelaskan mengapa Jia Han tidak setuju dengan cadangan peguam tersebut?

SP5: Masa itu belum gelap sepenuhnya, tapi lampu telah dipasang.

TPR: Seterusnya Jia Han kita pergi kepada semasa Jia Han nampak OKT tersebut menghisap rokok. Peguam ada tanya, he lifted his mask and then he started smoking. Jia Han jawab tidak setuju. Bolehkah Jia Han jelaskan mengapa tak setuju yang OKT mengangkat masknya?

SP5: Dia adalah tarik mask ke bawah.

TPR: Seterusnya Jia Han kita pergi kepada OKT yang hantar makanan. Yang hantar makanan. Peguam ada bertanya you only saw the side of his face sewaktu dia menghantar makanan di mana keterangan Jia Han sebelum itu dia tak pakai mask ya pada waktu tersebut. Jadi Jia Han jawab tidak setuju. Mengapa Jia Han tak setuju yang cadangan peguam yang Jia Han nampak side of his face?

SP5: Kerana saya ada nampak muka dia.

TPR: Jia Han tadi kamu sebelum ini menyatakan OKT berambut panjang dan dilepaskan begitu sahaja. Jadi waktu kamu buat pengecaman di dalam mahkamah hari itu, OKT kedua yang kamu camkan tidak berambut panjang dan tidak rambut tidak adalah. Jadi macam mana kamu masih boleh camkan OKT dalam mahkamah?

Mahkamah: Itu okay. He understands the question or not? Ask him the question?

SP5: Saya boleh camkan mukanya.

Mahkamah: So, dia boleh cam kerana muka tak kira rambut panjang ke pendek?

SP5: Tak kira.

Mahkamah: Okay.

TPR: Seterusnya Jia Han sewaktu pengecaman di balai polis ya, kamu bersetuju yang sewaktu pengecaman orang yang beratur di hadapan kamu ada juga orang yang mempunyai rambut panjang dan badan hamper seiras dengan OKT kedua yang kamu camkan. Jadi, bolehkah Jia Han jelaskan macam mana kamu boleh camkn OKT kedua yang kamu camkan instead of seorang lagi yang rambut panjang berada di barisan tersebut?

SP5: Saya masih boleh camkan separuh muka atas. Separuh atas muka beliau.

TPR: Seterusnya Jia Han, okay semasa soalan oleh peguam YB Rayer sebentar tadi, kamu ada beresetuju yang kamu tidak diberi peluang kedua untuk memastikan pengecaman semasa kamu buat pengecaman terhadap di Balai Polis Bukit Mertajam. Bolehkah kamu beritahu mahkamah kenapa kamu tidak minta untuk memberi membuat pengecaman kedua?

SP5: Kerana saya rasa tidak perlu. Sekali sudah cukup

TPR: Jia Han bolehkah Jia Han jelaskan mengapa Jia Han tak tersilap cam kedua-dua OKT1, OKT3 yang telah Jia Han camkan di dalam mahkamah?

SP5: Saya tahu, saya dapat camkan.

[18] Having scrutinised the entire evidence given by SP5, we find that no defects in the identification evidence neither there was any doubt in the identification of the three accused by SP5. The identification parade was conducted regularly, transparent and fair to the accused persons. The positive identification of the three accused persons at the identification parade on 20 July 2016 by SP5 and again she successfully identified them in court were safe to be acted upon. The learned trial judge had address and analysed this issue at length and concluded as follows:

18. As the material witness of the whole incident was the victim, the court had to assess not only credibility but also competency as the victim was only ten years during the incident and about 13 years old when he testified.

19. I asked a number of initial questions to determine whether the victim understood the oath and from my observation I determined that the victim understood the oath and its effect fully. The court also determined that not only the victim understood the oath but from the subsequent examinations by the prosecution and the defense the court also determined that the victim was a competent, consistent, confident and a truthful witness.

20. The victim was also intelligent beyond his tender age. For instance, when the defense counsel tried to corner him on his evidence that he was blindfolded while in the car and while in confinement he could not have seen the faces of the accused, the victim calmly answered that while in the car at certain times he had quietly lifted the blindfold and had clearly seen the faces of the accused. Also, at one time while in confinement when he was given food one of the accused had removed his mask to smoke so he saw the face clearly.

25. In this case the defense had highlighted a number of flaws in the identification parades which had not complied with a number of guidelines as mentioned in the

cases above. In the court's view the most important underlying factor when conducting an identification parade is that it must be held in a manner which is fair, transparent with no advantage given to the victim over the suspects to be identified.

26. The court noted that in this case the officers conducting the identification parade had taken the necessary precautions and safeguards to ensure that the identifiers had no prior knowledge of the presence or identity of the suspects in the Identification parade. In this respect the court was satisfied that the victim and SP4 were not shown photographs of the accused beforehand nor had they the opportunity to see the accused before entering the place where the Identification was held.

27. The court was also satisfied that the victim and SP4 were not coached by the investigating officer or anyone else as to whom to identify at the identification parade. Further the court also noted that the police officers conducting the Identification parade had no prior knowledge of the full facts of the case and were independent of any ongoing investigations of the case.

28. The participants of the identification parade although were not of the same age or height and size of the accused and no particulars of the participants were given to court, the court accepts the testimony of the police officer's testimony that the participants were the best match available to participate during the identification parade. The court also is of the view that the diversity between the participants will not necessarily make it easier for the victim or SP4 to identify the accused amongst the participants.

29. In short, the court accepted the results of the Identification parade to be accurate. This fact was also bolstered by the testimony of the officers conducting the Identification parade that the victim and SP4 had without hesitation identified the accused.

30. The victim had also identified all the accused in court. Although it is generally believed that not much weight should be given to court identification, in this case the court gave adequate weight to the identification of the victim in court. This because although initially while testifying the court had placed a barrier between the victim and the accused fearing that the sight of the accused might scare the victim off, later when the court questioned the victim, he stated that he was ready to face the accused and identify them.

31. This was when the court allowed the victim to identify the accused where the victim not only could identify all the three accused but also confirmed as to the role played by each of the accused during abduction and confinement. This clearly showed that the victim had made no mistake in identifying all the three accused at the identification parade.

[19] We are mindful that when the identity of an accused is raised, the court ought to have in mind the guidelines set out in *R v Turnbull and others* [1976] 3 All ER 549 when assessing the quality of the identification evidence. Lord Widgery CJ (as he then was) enunciated what were later termed as the *Turnbull* Guidelines and said as follows:

A Firstly, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for
B such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in
C which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long
D elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution has reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the
E police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be
F reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example when the identification is made
G after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to
H justice would frequently occur.

[20] In the case of *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49, the Federal Court through the judgment delivered by Richard Malanjum CJ (Sabah and Sarawak) (as he then was) held as follows:

I [47] To begin it is in the forefront of our minds the Turnbull guidelines (*R v Turnbull* [1976] 3 All ER 549) as succinctly summarised in the case of *Heng Aik Ren Thomas v Public Prosecutor* [1998] 3 SLR(R) 142. Delivering judgment for the Singapore Court of Appeal M Karthigesu JA said this at paras 33–35 of the judgment:

Although the Turnbull guidelines were drafted to assist a trial judge in correctly directing the jury, the principles which were enunciated in it are of equal relevance to our criminal trial system. In adapting the Turnbull guidelines for our local system, we have reworked the Turnbull guidelines into the following three-step test. The first question which a judge should ask when encountering a criminal case where there is identification evidence, is whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken.

If so, the second question should be this. Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observationwas made, the presence of obstructions in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If after evaluation of the identification evidence, the judge is satisfied that the quality of the identification is good, he may then go on to safely assess the value of the identification evidence. Where the quality of the identification evidence is poor, the judge should go on to ask the third question. Is there in any other evidence which goes to support the correctness of the identification. If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies on such poor identification evidence would be unsafe. The supporting evidence need not be corroboration evidence of the kind required in *R v Baskerville* [1916] 2 KB 658. What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification.

We agree with the summary of the guidelines.

(See also: *Zulkifli @ Sakun bin Ahmad Endin Chun lwn Pendakwa Raya* [2013] 1 MLJ 733; [2012] 1 LNS 435; *Dorai Pandian a/l Munian & Anor v Public Prosecutor* [2009] 4 MLJ 525; [2012] 10 CLJ 22.)

[21] ASP Cheok Kian Soon (SP2) who conducted the identification parade on 14 July 2016 strengthens SP5's and SP4's evidence when he said in his witness statement (encl 9 record of appeal Vol 2 (3) pp 523–531), inter alia, as follows:

4. Pada 14/07/2016, jam lebih kurang 1400hrs semasa berada di IPD SPT, saya telah terima arahan daripada ASP G/13455 Hasan bin Mohamad Salih untuk menjalankan kawat cam cermin satu hala berkaitan Bukit Mertajam rpt: 7850/16, Sek.3(1) Akta Culik 1961, bagi tujuan pengecaman saksi (A1) Khor Jia Han, KPT:

061027–07–0551 dan saksi (A2) Ang Suat Kee, KPT: 680723–07–5092 ke atas suspek-suspek (B1) Quaik Yong Lai, KPT: 820314–07–5421, (B2) Heng Tian Chuan, KPT: 821214–07–5023, (B3) Goh Jit Ee, KPT: 800501 –07–5031 dan (B4) Lim Ho Min, KPT: 801204–07–5187.

16. ... Saksi (A1) dapat mengecam suspek (B1) di kedudukan nombor 5 dan suspek (B2) di kedudukan nombor 12 secara positif. Kemudian saksi (A1) telah dibawa keluar dari bilik kawat cam oleh anggota pengiring saksi Kpl 99634 Rosli bin Othman dan juga bapa saksi (Al) untuk menunggu di bilik Insp. Izzat. Suspek (B1) telah diberitahu haknya untuk mengubah kedudukan dalam kawat cam dan (B1) berdiri di kedudukan nombor 3. Suspek (B2) telah diberitahu haknya untuk mengubah kedudukan dalam kawat cam dan (B2) berdiri di kedudukan nombor 9. Tiada sebarang bantahan dibuat oleh suspek tentang komposisi atau pengendalian kawat cam oleh saya.

17. Pada 14/07/2016, jam lebih kurang 1655hrs saksi (A2) telah dibawa balik ke Bilik Taklimat Balai Bukit Mertajam diiringi oleh anggota pengiring saksi (A2) D/Kpl 139485 Mohd Amran bin Mohamad. Saya telah bawa saksi (A2) dari Bilik Taklimat Balai Bukit Mertajam yang diiringi oleh anggota pengiring saksi (A2) D/Sjn 116605 Mat Isa bin Maslan masuk ke dalam bilik kawat cam cermin satu hala. Saya telah beritahu saksi bahawa suspek mungkin berada atau tidak berada dalam barisan kawat cam tersebut. Saksi (A2) tidak diberitahu untuk mengecam saspek dengan menyebut nombor kedudukan suspek. Saksi (A2) juga tidak meminta untuk mendengar suara orang-orang yang berada dalam perbarisan. Saksi (A2) dapat mengecam suspek (B1) di kedudukan nombor 3 dan suspek (B2) di kedudukan nombor 9 secara positif. Kemudian saksi (A2) telah dibawa oleh anggota pengiring saksi D/Sjn 116605 Mat Isa bin Maslan untuk menunggu di bilik Insp. Izzat. Manakala suspek (B1) dan (B2) dieskot oleh anggota eskot D/Sjn 119542 Mohd Hafidz bin Abd Karim dan D/Kpl 97853 Kannan a/l Narayan masuk ke dalam bilik pemeriksaan, lokap IPD SPT.

19. Pada 14/07/2016, jam lebih kurang 1705hrs saksi (A1) telah dibawa balik ke Bilik Takllmat Balai Bukit Mertajam diiringi oleh anggota pengiring saksi Kpl 99634 Rosli bin Othman dan juga bapa saksi (A1). Saya telah bawa saksi (A1) darl Bilik Taklimat Balai Bukit Mertajam yang diiringi oleh anggota pengiring saksi L/Kpl 182508 Muhammad Arif bin Moktar dan juga bapa saksi (A1) masuk ke dalam bilik kawat cam cermin satu hala. Saya telah beritahu saksi bahawa suspek mungkin berada atau tidak berada dalam barisan kawat cam tersebut. Saksi (A1) tidak diberitahu untuk mengecam saspek dengan menyebut nombor kedudukan suspek. Saksi (A1) juga tidak meminta untuk mendengar suara orang-orang yang berada dalam perbarisan. Saksi (A1) dapat mengecam suspek (B3) di kedudukan nombor 3 secara posit if tapi tidak dapat mengecam suspek (84) secara positif. Kemudian saksi (A1) telah dibawa keluar dari bilik kawat cam oleh anggota pengiring saksi L/Kpl 182508 Muhammad Arif bin Moktar dan juga bapa saksi (A1) untuk menunggu di bilik Insp. Izzat. Suspek (B3) telah diberitahu haknya untuk mengubah kedudukan dalam kawat cam dan (B3) berdiri di kedudukan nombor 3. Suspek (B4) telah diberitahu haknya untuk mengubah kedudukan dalam kawat cam dan (84) berdiri di kedudukan nombor 9. Tiada sebarang bantahan dibuat oleh suspek tentang komposisi atau pengendalian kawat cam oleh saya.

20. Pada 14/07/2016, jam lebih kurang 1710hrs saksi (A2) telah dibawa balik ke Bilik Taklimat Balai Bukit Mertajam diiringi oleh anggota pengiring saksi (A2) D/Sjn 116605 Mat Isa bin Maslan. Saya telah bawa saksi (A2) dari Bilik Taklimat Balai Bukit Mertajam yang diiringi oleh anggota pengiring saksi (A2) D/Kpl 139485 Mohd Amran bin Mohamad masuk ke dalam bilik kawat cam cermin satu hala. Saya telah beritahu saksi bahawa suspek mungkin berada atau tidak berada dalam barisan kawat cam tersebut. Saksi (A2) tidak diberitahu untuk mengecam saspek dengan menyebut nombor kedudukan suspek. Saksi (A2) juga tidak meminta untuk mendengar suara orang-orang yang berada dalam perbarisan. Saksi (A2) tidak dapat mengecam suspek (B3) dan suspek (B4) secara positif. Kemudian saksi (A2) telah dibawa oleh anggota pengiring saksi D/Kpl 139485 Mohd Amran bin Mohamad untuk menunggu di bilik Insp. Izzat. Manakala suspek (B3) dan (B4) dieskot oleh anggota eskot Sjn 83411 Murugiah a/l Muthaiah dan L/Kpl 127580 Fasmurin bin Mat Yusof masuk ke dalam bilik pemeriksaan, lokap IPD SPT.

21. Pada 14/07/2016, jam lebih kurang 1720hrs semasa berada di bilik pemeriksaan, Lokap IPD SPT, saya telah maklumkan keputusan kawat cam kepada suspek (B1) hingga suspek (B4) dimana suspek (Bl), (B2) dan (B3) dicam oleh saksi (A1) secara positif manakala suspek (Bl) dan (B2) dicam oleh saksi (A2) secara positif.

22. Pada 14/07/2016, jam lebih kurang 1800hrs saya buat ID siasatan sepanjang proses kawat cam yang dijalankan menggunakan cermin satu hala dan laporan kawat cam berkaitan Bukit Mertajam rpt: 7850/16, Sek.3(1) Akta Culik 1961.

23. Saya kemudian serahkan ID siasatan beserta laporan kawat cam kepada pegawai penyiasat kes ASP G/13455 Hasan bin Mohamad Salih untuk tindakan selanjutnya. Saya juga telah turunkan tandatangan ke atas ID siasatan dan laporan kawat cam.

24. Saya mengesahkan pada bila-bila masa sebelum kawat cam dijalankan, saksi (A1) dan bapanya serta saksi (A2) tidak pernah ditunjukkan gambar suspek (Bl), (B2), (B3), (B4) ataupun ditunjukkan (Bl), (82), (B3), (B4) secara fizikal.

[22] Hence, on the facts and evidence adduced in this case we are satisfied that the learned trial judge had considered the evidence on this critical issue at the end of the case for the prosecution and upon giving them the maximum evaluation. Under intensive cross-examination, SP5 remained steadfast in her answers on her identification of the accused. The same goes to SP4. Hence, we find no justification to interfere with the assessment by the learned trial judge of SP5 and SP4 as a material witness on the issue of identification of the accused persons. There was ample corroboration of SP5's testimony in court by SP4 and identification parade conducted by the police (SP2) which had obviously enhance SP5 credibility. Accordingly, we are satisfied that the defence was rightly called by the learned trial judge at the end of the prosecution's case.

Defective charge

[23] It was strenuously contended for the accused that the charge is defective and has misled accused persons which in essence states that all the three accused had wrongfully abducted and wrongfully confined SP5 in the vicinity of music centre located at No 57, Taman Jernih Bukit Mertajam, Seberang Perai Tengah, Pulau Pinang. Was it a case of wrongful abduction or wrongful confinement or both? The charge is bad for duplicity because two different acts of kidnappings have been rolled into a single charge.

[24] With respect, we are not persuaded by such argument. It is clear from the wording of the charge that the act charged off is 'abduction and wrongful confinement' as expressly stated in the charge. The prosecution had described specifically the act that they had committed. Thus, the accused knew well what the case were against them when the prosecution closed its case and they had been afforded all the opportunity to present their defence. For that reason, it was open to the prosecution to choose and prove the relevant act in the course of the trial. Hence, we find no prejudiced suffered by the accuseds in preparing their defences. The charge was therefore not defective or a nullity.

[25] In fact the learned trial judge in his judgment has rightly found that the prosecution had proven all the three elements of abduction, wrongful confinement and wrongful restraint. This can be gleaned from the judgment as follows:

> 65. In this case the court finds that the prosecution although needing only to prove one of the three ingredients of abduction, wrongful confinement or wrongful restraint have proven all the three ingredients also beyond reasonable doubt. In fact, abduction and wrongful restraint have already been admitted to by the four accused themselves when they admitted restraining the victim and pushing her into the vehicle.

[26] Thus, we find that the point taken by the accused counsel is obviously unsustainable.

Demand for ransom

[27] The testimony of SP20 (Ng Siew Hui) that there was a demand of ransom is indeed credible. SP20 had no purpose or reason to fabricate her evidence against them. Support for this can be found in her evidence and we now reproduced (encl 8 record of appeal Vol 2 (2) pp 306–313):

> Semasa dalam perjalanan memandu saya terima satu panggilan telefon ke telefon bimbit saya. Pihak pemanggil memberitahu bahawa anak saya berada di tangan mereka dan minta saya bahawa anak saya berada di tangan mereka dan minta saya membayar sejumlah wang RM5 juta. Suara lelaki. Dia cakap dalam bahasa apa Teow Chew. Selepas minta bayaran RM5, saya minta hendak cakap dengan anak

saya dan cakap saya tak dapat duit sebanyak itu, nak minta kurang. Anak saya sempat bercakap dengan saya tetapi saya tidak sempat bercakap dengan anak saya kerana panggilan telah diputuskan.

Pada permulaanya kami ada buat tawar menawar mengenai harga pihak pemanggil enggan mengurangkan harga dan saya kata saya akan cuba dapatkan wang sejumlah itu. Semasa dengar suara anak saya melalui telefon saya menangis dan minta mereka jangan mencederakan anak saya. Wang akan saya cari sedaya upaya dan jika boleh saya minta kurangkan jumlah wang kerana saya tidak dapat kumpulkan wang sebanyak itu. Saya ada minta kurangkan sehingga RM2 juta.

Saya menghubungi uncle dan juga beberapa saudara untuk mengumpul wang. Kalau masih ingat jam berapa waktu itu? Mulai pukul 6 lebih sehingga pukul 7 lebih saya masih mengumpul wang.

Dalam masa ini kamu ada menghubungi suami kamu untuk meminta wang?

Masa tersebut suami saya sedang ambil penerbangan balik dari luar negeri dan tidak dapat menjawab telefon tetapi sebelum itu beliau telah menyuruh saya mengumpul wang dari saudara mara dan juga kawan-kawan.

Jam berapa kamu selesai kumpul wang dari saudara mara dan kawan kawan?

Siap pukul 9 malam dapat kumpulkan wang RM1.75 juta. Pada pukul 9 saya panggilan dari pemanggil dan saya beritahu pihak pemanggil saya tidak dapat kumpulkan RM2 juta. Kemudian pihak pemanggil telah setuju dengan jumlah RM1.75 juta dan memanggil saya membuat persediaan wang tersebut untuk membawa keluar membuat penyerahan.

Pada pukul 9 lebih saya terima panggilan sekali lagi semasa saya ingin keluar. Pihak pemanggil telah tanya saya wang diisi dengan apa dan saya jawab dengan bagasi. Pihak pemanggil tidak setuju dan arahkan saya isi wang ke dalam satu plastik beg sampah hitam.

Suami saya ada mengarahkan untuk rakam gambar wang dan saya juga ada inisiatif begitu ada niat untuk mengambil gambar kerana biasa tengok movie mereka akan ambil gambar wang sebagai bukti wang yang diserahkan.

Pukul 9 lebih tak ingat betul betul masa saya keluar itu. Semasa dalam perjalanan memandu kereta saya terima panggilan dan arahkan saya pergi ke tempat pertama iaitu pasar di Kampung Baru. Ada sampai di pasar tersebut saya telah menunggu seketika kemudian saya terima satu panggilan lagi arahkan saya untuk tukar tempat ke Jalan Sentosa. Satu taman di belakang taman Jalan Sentosa.

Selepas menunggu seketika di taman tersebut saya terima panggilan sekali lagi mengarahkan saya ke satu stesyen minyak di Jalan Kulim. Selepas menunggu seketika di stesyen minyak saya terima panggilan lagi mengarahkan saya ke Taman Kuari yang tanah yang lebih tinggi naik ke atas. Sampai di situ saya terima panggilan lagi mengarahkan saya meletakkan wang di semak samun yang tebal di tepi jalan. Kemudian saya mengikut arahan dan letakkan di tempat yang diarahkan kemudian saya balik ke rumah. Pemanggil suruh saya balik rumah tunggu panggilan. Sampai di rumah saya tidak dapat hubungi pemanggil kemudian pada pukul 11 lebih saya terima panggilan dan beritahu saya boleh ambil anak saya di satu perhentian bas tepi sebuah pasar di belakang rumah saya.

Oleh kerana kami tidak pasti exact point tempat yang tepat maka suami dan saya menaiki kereta berasingan untuk cari kawasan tersebut. Akhirnya suami saya telah jumpa di sebuah stesen bas berhampiran pasar di Alma jam lebih kurang 11.30. Tidak ingat waktu tepat. Anak saya sampai rumah dahulu, apabila lihat anak saya dia kelihatan ketakutan gementar dan panik. Tiada apa-apa kecederaan pada anak saya.'

Information leading to discovery under s 27 of the Evidence Act 1950

[28] Police investigation leads to the arrest of the three accused persons. The learned trial judge in his findings found that the statement given by the accused is admissible under s 27 of the EA. This can be seen from his grounds of judgments when he said as follows:

36. On the large sums of money seized by the police the defense contended that the sums of money were not discovered from the information given by the accused. In other words, the large sums of money were recovery rather than discovery and could not be attributed to the accused.

37. The court after considering the testimony of the police officers seizing the money from the accused is satisfied that the money was discovered on the information given by the accused. The police had no prior information or the knowledge of the said money before the arrest of the accused. On the evidence of discovery on information of the accused the provisions of s 27 of the Evidence Act applies.

39. The giving of the information by the accused as to the existence of the large sums of money clearly indicates their knowledge of the sums of money which is part of the ransom given by SP20. This in turn by conduct, indicates that the accused are complicit in the abduction and confinement of the victim. This again corroborates the victim's testimony on identity.

[29] In addition, SP18 (DSP Sam Phan a/l Prat Deng) testified and we now reproduced (encl 8 at record of appeal Vol 2 (2) pp 259–268) as follows:

Pada jam 01.00 hours iaitu jam 1 pagi, saya tangkap satu lelaki Cina bernama Quak Yong Lai (OKT1) di kawasan parking kereta, Taman lmpian Jaya dan memperkenalkan diri polis dan membuat pemeriksasan terhadap badan lelaki Cina tersebut. Hasil pemeriksaan badan lelaki Cina tersebut saya menjumpai sejumlah wang dan satu handphone di poket seluarnya dan juga satu kunci.

Selepas itu, saya ke alamat A1–14, Flat Taman lmpian Jaya, Bukit Mertajam dan bawa bersama lelaki Cina tersebut sampai di alamat tersebut dengan menggunakan kunci yang ada pada tangkapan buka pintu grill dan masuk ke dalam rumah tersebut dan tangkapan telah menunjukkan saya ke arah satu speaker yang ada di dalam ruang tamu. Selepas itu, saya membuka bahagian dalam speaker itu dan dapati di dalamnya ada satu bungkusan plastik merah. Apabila dibuka bungkusan plastik merah itu, didapati di dalamnya ada sejumlah wang. Dan saya diberitahu oleh tangkapan, jumlah duit lebih kurang RM30 lebih ribu, sejumlah duit.

Selepas saya membuat tangkapan terhadapnya. Saya ada buat temu bual dengan dia (OKT1) dan juga saya ada buat pemerhatian di kawasan itu dan saya nampak dia keluar daripada rumah tersebut.

TPR: DSP, selepas kamu selesai rampas duit di rumah A1–14, apa lagi yang kamu lakukan?

SP18: Selepas itu saya pergi ke Taman Perpaduan, Bukit Mertajam iaitu pergi ke alamat No. 22 Lorong Perpaduan 1 ini untuk membuat tangkapan? Lebih kurang pukul 2 pagi, pada tarikh yang sama iaitu 9.7.2016. Berpandukan dengan maklumat yang saya perolehi, saya percayai lelaki Cina yang saya buat tangkapan ini terlibat dalam kes culik (OKT2).

SP18: Selepas tangkapan OKT2 ini, daripada maklumat yang diterima, saya ada membuat serbuan lagi di Kepala Batas iaitu di Jalan 2 di satu premis. Dan telah memperkenalkan diri polis kepada satu lelaki Cina yang berada dalam premis tersebut dan juga membuat tangkapan dan rampasan sejumlah wang. Nama lelaki Cina yang saya buat tangkap adalah Lim Min Ho.

SP18: Semasa saya buat serbuan di dalam bilik ini, di dalam bilik ini hanya ada satu lelaki Cina bernama Lim Min Ho sahaja. Dan bersama-sama saya, 10 anggota saya dan juga satu lelaki Cina bernama Goh Jit Ee (OKT2). Saya buat pemeriksaan bilik tidurnya dan OKT3 ini, saya menjumpai sejumlah wang yang terletak di dalam laci di tepi almari baju berjumlah RM275 ribu.

SP18: Pohon saksi dirujuk dengan satu borang bongkar P11 di Jilid 1.

TPR: Rujuk P11. DSP adakah ini borang bongkar yang kamu sediakan?

SP18: Ya. lni borang bongkar yang saya sediakan rampasan duit RM275 ribu dan juga anak kunci laci.

TPR: DSP kamu rujuk pada sebelah tandatangan kamu, boleh beritahu mahkamah siapa yang tandatangan tersebut?

SP18: Saya buat rampasan dan ditandatangani oleh OKT2 bernama Goh Jit Ee.

TPR: DSP boleh kamu beritahu kepada Mahkamah mengapa Goh Jit Ee yang menurunkan tandatangan pada bahagian tandatangan P11.

SP18: Sebab daripada temu bual dan maklumat yang diperolehi Goh Jit Ee mengaku dia yang dia letakkan di situ.

PEG1&3: Saya terpaksa membantah kepada keterangan ini kerana bagi saya beliau telah turun tandatangan that's it. Anything beyond than that can be prejudicial.

Mahkamah: Saya benarkan jawapan itu under Section 27 Akta Keterangan.

TPR: Boleh beritahu Mahkamah mengapa kamu ke No 22 Taman Perpaduan?

SP18: Saya ke rumah OKT2 semula selepas saya temu bual OKT2 dan juga mendapat maklumat tentang sebilangan jumlah duit yang tersangkut dengan kes culik ini masih tersimpan di alamat tersebut.

[30] In support of the above evidence, SP19 (DSP Mohamad Shajidan bin Abdul Shukor) testified and we now reproduced (encl 8 record of appeal Vol 2 (2) pp 283–284) as follows:

Pada 11.7.2016 saya diberi arahan oleh Superintendent Kamaruddin, Pengurus D9 ketika itu mengarahkan saya untuk pergi terus ke Johor Bharu. Beliau memaklumkan kepada saya pergi terus ke Johor Bharu. Beliau memaklumkan kepada saya tugas saya adalah untuk membuat follow-up kesan dan tangkap seorang suspek yang terlibat dalam kes culik yang dilaporkan.

Lebih kurang pukul 1 pagi, saya bersama 3 anggota bertolak ke Johor Bharu dan awal pagi lebih kurang 7 pagi sampai di Johor Bharu. Saya menunggu pengesahan maklumat dari bilik gerakan Kontinjen Pulau Pinang dimana suspek telah cuba melarikan diri untuk masuk ke Singapura.

Sehinggalah lebih kurang jam 5 petang hari yang sama saya bersama pasukan saya telah pergi ke CIQ (Customs Immigration and Quaratine Complex) di Johor Bharu dan buat 1 tangkapan ke atas lelaki Cina hasil semakan butir peribadinya namanya Heng Tien Chuan. Saya terus perkenalkan diri sebagai pegawai polis kanan dan terus buat tangkapan dan buat rampasan passport, dompet, beberapa keping wang Singapore Dollars, Ringgit Malaysia dan juga wang China serta kad bank dan dokumen peribadi. Kemudian bawa suspek terus ke IPD Johor Bharu Utara.

Dari pukul 6 petang sehingga ke maghrib saya menemu bual penama Ah Chuan atau nama sebenarnya Heng Tien berkaitan kes yang sedang saya follow up. Heng Tien Chuan dengan rela hati ingin memberitahu saya dalam Bahasa Cina yang saya ingat 'Tuan Wa boleh bawa tunjuk itu tempat wa simpan itu duit culik' lebih kurang begitu. Saya buat lagi satu polis report berkaitan pendedahan yang telah dibuat oleh penama Ah Chuan. Saya bersama pasukan dan Bersama dengan Ah Chuan balik ke Pulau Pinang sehinggalah hari seterusnya 12 Julai jam 4.15 sorry 4.45 pagi terus bawa penama Ah Chuan ke rumah di Jalan Chin, Bukit Mertajam Pulau Pinang.

Bila sampai di rumah saya ketuk pintu telah keluar satu 1 lelaki Cina dan 1 perempuan Cina saya perkenalkan pegawai kanan polis dan semakan butir butir peribadi, kedua dua penama berikut adalah ibu dan ayah Ah Chuan. Saya masuk ke dalam rumah jenis teres dua tingkat tersebut bersama Ah Chuan. OKT tunjukkan sendiri tempat di mana beliau menyimpan duit hasil daripada culik yang telah dilakukan. Ah Chuan membawa ke tingkat atas bilik kedua di mana diberitahu saya adalah bilik beliau sendiri dan tunjukkan tempat sembunyikan duit. Pada awal beliau beritahu duit disimpan dalam peti besi. Namun mencari peti besi tidak ada. Saya menjumpai kotak putih kuning yang dalamnya ada beberapa note Ringgit Malaysia. Saya terus kira duit tersebut dan berjumlah RM88,984.00. Saya buat rampasan terhadap pelbagai note ringgit Malaysia. Semasa pemeriksaan juga disaksikan emak dan ayah Ah Chuan.

[31] The learned counsel for the first accused contended that the learned trial judge erred in law and facts when he rejected the first accused explanation that the alleged ransom money found in the premises at A1/14, Blok A, Flat Taman Impian Jaya, Alma, Machang Bubok, 14000 Bukit Mertajam, Pulau Pinang does not belonged to him. The trial judge was said to have based solely on the testimony SP18 that the first accused had led to the discovery of the alleged partial ransom money found inside the speaker placed at the living room within the premises.

[32] It was further argued that that this piece of evidence had failed to fulfil the pre-conditions of s 27 of the Evidence Act 1950 as it was only introduced during SP18's testimony in court. Reliance is place to the case of *Krishna Rao Gurumurthi & Anor v Public Prosecutor and another appeal* [2007] MLJU 888; [2007] 4 CLJ 643, where Gopal Sri Ram JCA (as he then was) laid down the approach the court should take when dealing with the discovery information (at p 662 (CLJ)):

> [24] ... The way in which s 27 of the Evidence Act should be approached has been fairly worked out in the many decided cases that have discussed it. There are so many that it is neither feasible nor desirable to discuss them all here. But the common thread that runs through all of them is clear enough. It is that the section — like so many other areas in the law of evidence — rests on the twin pillars of reliability and accuracy. Accordingly; the first question that a court must ask itself is this: Did the accused ever make a discovery statement? This turns on the credibility of the policeman who gives evidence of the discovery statement. If the court is satisfied that the first question must be answered in the negative, that is to say; that the alleged statement is a fabrication, then that is the end of the matter and no further steps in the inquiry are necessary. But if the court decides that the first question should receive an affirmative response, then it must ask itself the second question. Is the version of the discovery statement put forward by the policeman giving evidence of it accurate enough to be acted upon? If the accuracy of the statement is in doubt then it should be rejected. Otherwise it should be accepted.

[33] With respect, we are constrained to say that these argument does not hold enough weight to overcome our evaluation of all the evidence in totality supporting the prosecution case. Eventhough SP18 did not record the details in any contemporaneous note, nor produce any arresting report to corroborate and verify the information given by the first accused the fact that the first accused, *pointed out* to the speaker which leads to the discovery of the ransom money fall within the scope of s 27 of the Evidence Act 1950.

[34] To fortify this finding, we can do no better than referring to the Federal Court decision in *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 CLJ 149, where Ahmad Maarop FCJ (as he then was) delivering the judgment of the court held as follows:

> [20] Learned counsel argued that in the present case there was no oral evidence or document before the court to establish what was the information allegedly given by Siew to PW6. Learned counsel contended that the act of pointing did not amount to information under s 27 of the Evidence Act.
>
> [22] It is very important to note that s 27 of the Evidence Act uses 'information' instead of 'statement'. Information cannot be used as synonymous with statement. Information connotes two things — (a) a statement or other means employed for imparting knowledge possessed by one person to another, and (b) the knowledge so derived by the other person.
>
> [24] *Karam Din v Emperor* was followed in *Public Prosecutor v Hashim Hanafi*

[2002] 4 MLJ 185; [2003] 8 CLJ 555 where Augustine Paul J (later FCJ) said:

> It is therefore clear beyond doubt that the information given by an accused under s 27 need not be in the actual words used though a written record is desirable. This is justified on the ground that s 27 uses the word 'information' and not the word 'statement' which is used in ss 17–31 of the Act.

[26] In fact, earlier, in *Wai Chan Leong v Public Prosecutor* [1989] 3 MLJ 356; [1989] 2 CLJ 1168; [1989] 1 CLJ Rep 171, the Supreme Court had already decided that 'information' which was deliberately used by the legislature under s 27 of the Evidence Act, (unlike statement), included knowledge derived by the person informed by the accused as well as the means used to impart that knowledge.

This is clear from the judgment of Gunn Chit Tuan SCJ delivering the judgment of the court:

> It must be observed that the legislature has used the expression 'information' in s 27 of the Evidence Act and therefore did not intend it to have the same meaning as a statement. Although the expression is not defined in the Evidence Act, unlike a statement, it includes knowledge derived by the person informed by the accused as well as the means taken to impart that knowledge.

[27] The decision in *Wai Chan Leong v Public Prosecutor* was followed by the Singapore Court in *Public Prosecutor v Chin Moi Moi* where Yong Pung How CJ said at p 305:

> It is material to note that 'information' under s 27 does not only apply to statements. The words 'whether such information amounts to a confession or not' clearly indicate that 'information' is not only limited to a statement by the accused but also encompasses acts or conduct of the accused which relate distinctly to the fact discovered. This would of course consist of acts like pointing out the place where an article is hidden or where the accused leads the police to the article. As was held by Gunn SCJ in Wai Chan Leong, 'information' included knowledge derived by the person informed by the accused as well as the means taken to impart that knowledge.

[28] In the light of the authorities referred to, we hold that information admissible under s 27 of the Evidence Act includes accused's statement, or his act or conduct such as pointing out which leads distinctly to the discovery of a fact. For such information to be admissible in evidence, there is no duty on the prosecution to prove the voluntariness of the information. Hence it is not necessary to conduct a trial within a trial to determine the voluntariness of the information (see *Amathevelli a/p Ramasamy v Public Prosecutor* [2008] 3 MLJ 7; [2008] 4 CLJ 413 (CA) per Raus Sharif JCA (now PCA), *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; [2005] 2 CLJ 481 (FC), *Mohd Ya'cob bin Demyati lwn Pendakwa Raya* [2011] 2 MLJ 321; [2011] 4 CLJ 758 (CA) (affirmed by the Federal Court in Criminal Appeal No 05–122 of 2008(N) on 2 November 2010, and the application to review the aforesaid decision was also dismissed by the Federal Court on 10 February 2011). Reverting to the facts of the present case, admittedly there is no evidence to show that Siew had given any statement to PW6 when asked by PW6 where the key was. However, PW6 testified that the bunch of eight keys was found on top of the lamp which was fixed above the door to the bathroom, and it was pointed by Siew.

PW6 said that the location of the bunch of keys was such that one would not be able to see it if one was entering the bathroom. In other words, if Siew had not pointed it to PW6, the latter would not be able to retrieve the keys. Applying the authorities which we have referred to, we hold that Siew's act of pointing to the place where the bunch of keys was found amounted to information, and that information related distinctly to the discovery of a fact — the bunch of eight keys, ('the first fact') and was admissible under s 27 of the Evidence Act 1950.

[29] In addition, it must be added that the evidence of Siew leading PW6 and the police team to the first house and pointing out the place where the bunch of eight keys was found, and later pointing out the place where the key to the safe was found would also be relevant and admissible as conduct under s 8 of the Evidence Act. In this regard in *Prakash Chand v State* AIR 1979 SC 400, the Supreme Court of India said:

> For example, the evidence of the circumstances, simpliciter, that an accused person led a police officer and pointed out the place where stolen articles or weapons which have been used in the commission of the offence were found hidden, would be admissible as conduct, under s 8 of the Evidence Act, irrespective of whether any information contemporaneously with or antecedent to any such conduct falls within the purview of s 27 of the Evidence Act (vide *Himachal Pradesh Administration v OM Prakash* AIR 1972 SC 975).

[35] As for the third accused, it is apparent from the evidence of SP19 that when the third accused was arrested, the accused gave information to him leading to the discovery of the ransom money. Subsequently, SP19 made a police report on the information given. Hence, s 27 of the Evidence Act 1950 does apply here.

[36] To summarise, we find ourselves in agreement with the finding made by the learned trial judge on the issue of s 27 of the Evidence Act 1950. Such findings of facts must certainly be remained undisturbed.

Common intention

[37] Based on the evaluation of all the evidence in totality, we are fully satisfied that all the three accused persons had acted together in furtherance of their common intention. The learned trial judge had not erred and his findings were fully supported by both oral and documentary evidence heaped against the accused persons. In our view, it leaves no leeway for appellate interference in the circumstances of this case.

[38] Section 34 of the Penal Code is a rule of evidence and does not create a substantive offence. Common intention is a question of fact. The proof of common intention is the matter of inference from the circumstances. *Mens rea* being a mental element or state of mind is not usually capable of being established by way of direct evidence. It can be gathered from indirect evidence

in each particular case. It can also derive from the conduct of the accused. See *Public Prosecutor v Roslizam bin Abdul Azis & Anor* [2005] 1 MLJ 261; [2004] CLJU 196; [2004] 1 LNS 196, *Public Prosecutor v Azman bin Ismail & Ors* [2007] 3 MLJ 628; [2007] 10 CLJ 469, *Public Prosecutor v Norazman bin Ibrahim* [2005] MLJU 546; [2006] 8 CLJ 462 and *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603.

[39] Justice Hashim Yeop A Sani J (as he then was) in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 267; [1983] 1 CLJ 138; [1983] CLJ Rep 721 at p 749 held as follows:

> Under s 34 of the Penal Code, to succeed the prosecution must prove that the criminal act was done in concert pursuant to the prearranged plan or arrangement. In practice it is of course difficult to produce direct evidence to prove the intention of an individual. In most cases, however, it can be inferred from his act or conduct or other relevant circumstances of the case (see *Mahbub Shah v King Emperor* 1945 72 IA 148, 153).

Then, His Lordship continued:

> Thus, it is clear that the leading feature of s 34 of the Penal Code is the element of participation in action. Two preliminary elements are in fact necessary to fulfil the requirement of s 34. First, there must be evidence (direct or by inference) the accused was present at the scene of the crime. Secondly, there must be evidence to show that there was prior concert or prearranged plan involving the accused. This is logical because how can there be participation without physical presence. Even passive participation may require physical presence.

[40] In somewhat similar situation, the Supreme Court in *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336; [1987] 1 CLJ 540 speaking through Syed Agil Barakbah SCJ (as he then was) set out the law to be applied on the question of common intention. The words still ring in our ear where His Lordship said (at pp 344–345):

> In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was: (a) a common intention to commit the very offence of which the Accused persons are sought to be convicted; and (b) participation in the commission of the intended offence in furtherance of that common intention.
>
> Where the prosecution case rests on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the

conduct of the accused (see the Supreme Court (of India) on Criminal Law 1950-1960 by JK Soonavala p 188 to 193). A

[41] In *Farose bin Tamure Mohamad Khan v Public Prosecutor and other appeals* [2016] 6 MLJ 277; [2016] 9 CLJ 769 Raus Sharif PCA (as he then was) delivering the judgment of the Federal Court said at pp 294–295 (MLJ); pp 788–789 (CLJ): B

[47] It is helpful to analyse s 34 in terms of these elements;

(a) a criminal act; C

(b) participation in doing of the act;

(c) a common intention between the parties; and

(d) the act must be done in furtherance of the common intention.

[48] At this juncture, it is convenient first to address the generally accepted principles on the operation of s 34. The position in respect of these elements is fairly uncontroversial, and the relevant principles gleaned from the authorities in Malaysia, Singapore and India can be briefly dealt with. D

[49] It is widely acknowledged that s 34 is a rule of evidence which embodies the common-sense principle that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually (*Krishna Rao a/l Gurumurthi v Public Prosecutor and other appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603). E

[50] If it is shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all, liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone (*Mahbub Shah v Emperor* AIR 1945 PC 118). F

[51] The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them (*Hari Ram v State of Uttar Pradesh* [2004] 8 SCC 146). In those circumstances, the law makes no distinction between them or between the parts played by them in doing the criminal act (*Bashir v State* AIR 1953 All 668). G

[52] Presence is not necessary to constitute participation in every case. It is sufficient for the accused to have done an act with some nexus to the offence (*Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37; [2005] 1 CLJ 466 and *Manikumar Sinappan & Ors v Public Prosecutor* [2015] MLJU 1956; [2016] 3 MLRA 1). H

[53] Common intention, distinguished from the same or similar intention, requires proof that the criminal act was done in pursuance of a pre- arranged plan (*Mahbub Shah*). Such pre-planning may develop on the spot or in the course of commission of an offence, the crucial test being the plan must precede the commission of the offence *((1) Namasiyiam (2) Rajindran (3) Goh Chin Peng and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336). I

A [54] A common intention may be often be difficult to prove by way of direct evidence in practice, but it can be inferred from the circumstances of the case and the conduct of the accused (*Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ Rep 101).

B [66] The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. Direct evidence as proof is difficult to procure because common intention is essentially a state of mind. Invariably inferences have to rely upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them or such other relevant circumstances
C available. The totality of the circumstances must be taken into consideration in arriving at a conclusion whether there is a common intention to commit the offence for which the accused could be convicted. The facts and circumstances of each case might vary. As such, each case should be decided based on the facts involved.

D **[42]** Having laid down the principles of law on s 34 of the Penal Code, we will now come to the issue of whether the accused persons had the common intention of committing the offence of kidnapping for ransom. The best evidence to establish common intention is to look at their conduct prior to, at the time of and after the offence. All these acts when combined together proved
E their nexus to the offence, stands. Their involvement can be gathered, inter alia, from the following evidence:

(a) SP5 not only could identify all the three accused but also confirmed as to the role played by each of the accused during abduction and
F confinement. This clearly showed that all the three accused had the common intention to abduct the SP5 for the purposes of demanding ransom moneys;

(b) the chronology of the events and the manner in which the whole incident was executed also shows that it was well planned. The accuseds knew the
G whereabouts of the victim and then proceeded to force her into another car and then confined her in a house rented by the third accused clearly showed shows their common intention;

(c) all these acts when combined together proved their common intention; and
H

(d) some of the notes discovered by the police from the information given by the accused matched the serial numbers of the stack of money given as ransom.

I *Whether prosecution has proven its case beyond reasonable doubt*

[43] To answer this issue, it is perhaps pertinent to highlight the findings made by the learned High Court judge at the end of defence's case which we have summarised as follows:

(a) the evidence of the first and third accused was a bare denial both as to abduction and confinement as well as to the discovery of the money. The trial judge chose to believe the testimony of the prosecution witnesses over the evidence of the first and third accused;

(b) for the second accused, his failure to call any witnesses to support his defence of alibi clearly showed his defence was baseless and a complete lie;

(c) there is overwhelming evidence to find that the prosecution has proven the charge against all the accuseds beyond reasonable doubt;

(d) the trial judge accepts and believes the evidence of the victim and the other relevant prosecution witnesses that the main intent of the accuseds was to demand for ransom. The trial judge does not accept the testimony of the accused that the intention was only to collect bad debt;

(e) apart from demand for ransom, the prosecution has to prove either the victim was abducted or wrongfully confined or wrongfully restrained. The trial judge found that the prosecution has proven all the three ingredients beyond reasonable doubt. In fact, abduction and wrongful restraint had been conceded by the accuseds themselves when they admitted restraining the victim and pushing her into the vehicle;

(f) the trial judge was of the view that the manner in which the whole incident was executed also shows that it was well planned. By their own admission all the accused were in touch with each other during the entire incident;

(g) s 34 of the Penal Code on common intention has been satisfied and has been proven beyond reasonable doubt; and

(h) the prosecution has proven all the ingredients of the offence beyond reasonable doubt and all the accused guilty of the charge against them.

[44] As for the defence of bare denial, the Federal Court in the case of *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195, through the judgment delivered by Raja Azlan Shah CJ (as His Royal Highness then was) had occassion to say:

> The defence was, in effect, a simple denial of the evidence connecting the appellant with the four boxes. We cannot see any plausible ground for saying that the four boxes were not his. In the circumstances of the prosecution evidence, the High Court came, in our view, to the correct conclusion that this denial did not cast a doubt on the prosecution case against the appellant.

[45] In the case of *Public Prosecutor v Lim Chooi Huat & Anor* [2011] MLJU 852, the court held as follows:

> I am of the view that OKT2 is an unreliable witness and his evidence is unacceptable. OKT2's evidence was riddled with bare denials. And it is settled law

A that a bare denial is not a defence: see the Federal Court case of *DA Duncan v Public Prosecutor* [1980] 2 MLJ 196.

[46] A close scrutiny of the learned trial judge judgment revealed that he had judicially considered the defence advanced by the accused persons and weigh B all their evidence before coming to a definite finding of fact. The learned trial judge had not fallen into error in his findings when he relies heavily on the evidence given by SP5 placed before him and after giving sufficient appreciation to the other overwhelming oral and documentary evidences in its entirety. We do not find any infirmities in the decision of the learned trial C judge.

[47] In addition, it is crystal clear from the judgment that the learned trial judge had rightfully, appropriately and inclusively addressed his judicial mind D to the defence, considered their versions and adequately explained why he chose to disbelieve the evidence of the defence. We do not see how he can be said to be wrong with his finding of facts. He had the advantage of seeing and hearing the witnesses. In the premises, we find no misdirection on the part of the learned trial judge that warrant appellate intervention.

E

[48] In *Yahaya bin Mohamad v Chin Tuan Nam* [1975] 2 MLJ 117; [1975] 1 LNS 195; [1975] 1 MLRA 322, the Privy Council held:

(a) as in this case the learned trial judge had based his finding on the evidence F of the plaintiff and his witness, his finding should not have been disturbed; and

(b) this was not one of those rare cases where an appellate court, lacking the advantage of seeing and hearing the witnesses, was justified in coming to G a different conclusion from the trial judge on the question of credibility. There was no reason to think that the trial judge had not taken proper advantage of his having seen and heard the witnesses.

CONCLUSION

H

[49] We had perused all the notes of proceedings and had considered the submissions of parties. With the overriding principles in mind as stated in the above, we have reached our unanimous decision.

I **[50]** For all the reasons stated above, we find that the conviction of the three accused persons safe and we accordingly dismissed their appeal and affirmed the conviction meted out by the learned out by the trial judge.

Appeals dismissed; conviction affirmed.

Reported by Dzulqarnain Ab Fatar